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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. _____.

JOSEPH V. FRANCO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on November 30, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at ____ F.2d ____, and is printed as Appendix A, *infra* pp. 21-33. The opinion of Honorable Thomas P. Thornton, United States District Court Judge, denying defendant's motion for a new trial is unreported and is printed as Appendix B, *infra* pp. 34-48.

JURISDICTION.

The judgment of the Court of Appeals (Appendix C, *infra* p. 49) was entered on November 30, 1970. Timely petition for rehearing was filed on December 11, 1970, and denied on January 19, 1971 (Appendix D, *infra* p. 50). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED.

1. Constitutional Provisions.

(A) Amendment V to the Constitution of the United States provides in pertinent part:

> "No person shall be * * * deprived of life, liberty or property without due process of law; * * *."

(B) Amendment IV to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Statutes Involved.

(A) The Landrum-Griffin Act, 29 U.S.C.A., 431, *et seq.* provides in pertinent part:

> "Sec. 431(b): Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year . . .

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment."

"Sec. 437(b): Each person required to file a report under section 201(b), 202, 203(a), or the second sentence of 203(b) shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 201(b), 202, 203(a), or the second sentence of 203(b), as the case may be, for only a portion of such a fiscal year (because the date of enactment of this Act occurs during such person's fiscal year or such person becomes subject to this Act during its fiscal year) such person may consider that portion as the entire fiscal year in making such report."

"Sec. 439(b): Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

3. Rules Involved.

(A) Federal Rule of Criminal Procedure 16(e) provides:

"(e) **Protective Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. If the court enters an order granting relief following a showing *in camera*,

the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant."

QUESTIONS PRESENTED.

I. Whether a union officer charged under the Landrum-Griffin Act with failure to disclose loans made to him in the union's required annual report is denied due process and fair trial when there is admitted in evidence a mass of incompetent, irrelevant and immaterial evidence showing that additional unreported loans were made to him, that he mishandled union fiscal affairs; and the prosecution relies in summation thereon as demonstrating guilt.

II. Whether a defendant receives due process, and a fair trial when incompetent, irrelevant and immaterial evidence, and summation present him to the jury as a "evil man."

III. Whether a charge to a jury that the issue of materiality of information contained in a union's annual report required under the Landrum-Griffin Act, is a question of law for the court, and that the court found materiality, is erroneous when in fact materiality under the circumstances is a mixed question of law and fact.

IV. Whether, upon admission of the government post trial that there was illegal electronic surveillance of a defendant, a protective order pursuant to federal criminal rule 16(e) may be imposed without a showing of need, or reason for such order.

V. Whether, upon admission of the government post trial that there has been illegal electronic surveillance of a defendant, a court may deny a hearing to defendant on

the issue of taint, unless the defendant makes a prior showing that the government used the illegally obtained evidence in trial.

VI. Whether, in a trial commencing after the *Alderman* decision, an admission by the government post trial that there was illegal electronic surveillance of a criminal defendant during the period between indictment and trial requires an order granting a new trial.

VII. Whether a defendant may be convicted of failing to report loans made to him prior to the effective date of the Landrum-Griffin Act.

STATEMENT.

Petitioner was convicted on a one count information in the United States District Court for the Eastern District of Michigan, Southern Division, of making a false statement in violation of the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin); and received a sentence of imprisonment for a period of ten months.

The Government's case was that the LM2 report (required by the Landrum-Griffin Act) filed by Local 42, General Industrial Employee's Union, for the year 1959, (GE 1, A 6)* was signed by the Petitioner as Secretary-Treasurer of Local 42 (A 9); and that in Schedule H of that report (GE 1, Sched. H, Line 1), only one 1959 loan to Petitioner was listed: a sixty day note in the amount of $300.00. This, the Government contended, was false; that additional indirect loans had been made to Petitioner during 1959. The Landrum-Griffin Act became effective September 14, 1959 (29 U.S.C. 431, *et seq.*) and provides

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* "GE" references are to "Government Exhibits"; "A" references are to the page of the Appendix in the Court of Appeals, three copies of which are being filed with this Petition.

in legal effect that the period September 14, 1959 to December 31, 1959, constitutes the first fiscal year for reporting purposes (29 U.S.C. 437(b); A 6-7).

The Government furnished a Bill of Particulars setting out the loans which were unreported by Petitioner as follows:

March 23, 1959	$130.50
August 3, 1959	73.79
September 22, 1959	500.00
September 29, 1959	52.32
October 5, 1959	250.00
October 5, 1959	500.00
October 23, 1959	500.00
November 18, 1959	314.31

On trial the evidence showed that checks were on the foregoing dates and amounts drawn on the Local's bank account, that none of the checks were payable directly to Petitioner, but that on the stub of each of the checks was a notation which in substance said that the amount thereof was to be refunded by Petitioner. The Government contended that none of these checks were for items properly chargeable to the Local; that they paid personal bills of the Petitioner, were ultimately repaid by Petitioner, and that they were therefore indirect loans, and should have been reported in the LM2 report. The Government's evidence showed that each of these amounts were "refunded," i.e. repaid, by Petitioner on December 14, 1959 (GE 3-10, A 17-25).* None of the witnesses characterized these transactions as loans, and there was no evidence that the Petitioner so regarded them. Affirmative evidence of Petitioner (A 44-51) and another officer of the Local,

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* The Court of Appeals opinion states that one of the items was repaid on July 1, 1959 (App. A, p. 23 *infra*). This is erroneous as the payment of July 1, 1959 did not involve any of the amounts listed in the Bill of Particulars.

Mr. Bellfly (A 44) negated the theory that the transactions listed in the bill of particulars were loans. Bellfly testified that Petitioner paid the bills of the Local subject to disapproval by the Executive Board, and in such cases Petitioner reimbursed the Union (A 38-40).

I.

In recross examination of Bellfly, the Government produced an alleged 1959 year end financial report for the Local prepared by its certified public accountants (GE 13, A 44-46). An item on that exhibit read "Loans repayable —December 31, 1959, Joseph Franco, $1,000.00." Both Bellfly (A 47) and Petitioner (A 55-56) were questioned in respect of this $1,000.00 entry. Since all the "unreported loans" listed in the bill of particulars were admittedly repaid by December 14, 1959, it was patent that this alleged $1,000.00 loan was not one of those Petitioner was charged with having not reported. The Government contended that this evidence of an outstanding loan at the end of fiscal 1959 was offered on the issue of "credibility" (A 55). The Exhibit was admitted over objection (A 46). The Court of Appeals held, *infra,* at p. 26, that "the report was relevant to show that the Union did make what it considered a loan to Franco, whether in 1959 or otherwise."

The minute book of Local 42's Executive Board was also admitted into evidence, over objection (GE 14, A 65). The Government contended that the book was relevant to show that Petitioner had repaid the "loans" listed in the Bill of Particulars notwithstanding the Executive Board's minutes did not indicate disapproval of the items listed. Petitioner was examined in this respect, and admitted he found no minutes disapproving the expenditures (A 64). Government counsel then referred to the minutes of an October 24, 1960 meeting in which it was recited that all

expenditures for 1959 had been examined and approved by the Executive Board on that date. Before sending the minute book to the jury, the Court suggested excising irrelevant portions of the minutes, but upon Government Counsel's assurance that he was unaware of any irrelevant portions (A 68), the judge permitted the entire minute book to go to the jury.

During the course of its deliberations, the jury asked for clarification of a loan agreement it found (page 142 of GE 14) set out in a meeting of the Executive Board of January 27, 1959, which in pertinent part stated (A 80-81):

> "Request made by Brother Franco, that Local 42 stand good for $1500—owed to Universal Credit which will be repaid by Brother Franco before December 31st.
>
> Present and concurring in this decision to allow Brother Franco this courtesy was Bashor, St. Denis, Neville, Wilson and Bellfly . . . ."

Since this additional loan was not within the Bill of Particulars (admitted by Government Counsel (A 81)), the Court ordered the jury to disregard it (A 82-83).

During Petitioner's direct testimony it was elicited that GE 5 contained a bill from the Castaways Motel in Miami, Florida (incurred during Petitioner's attendance at a Teamster convention). The Court interjected (A 48), "*Is that the motel that is owned by the Teamsters*?" (emphasis added). On cross-examination of Bellfly, it was elicited that "Joe was down in Florida, that there was a Teamsters thing or something" (A 42).

In final argument, the Government relied heavily upon the "bad man" theory, Government Counsel argued:

> "To a Teamsters Convention? We don't know. He says, 'I can't remember.' What is a Teamsters Con-

vention? He belongs to Local 42. He is not a Teamster." (A 69) . . . "For a case of whiskey. It was a donation. He is a distiller. Why should he donate a case of whiskey, then, to the distiller? They have got access to it themselves." (A 69-70) . . . "Remember I told him, 'You are the defendant.' So we asked him, 'Well, did you get a report from your accountant?' and showed him Government Exhibit 13, dated March 11th, just shortly over a week before this report was submitted 'What does it reflect you owed the union as of the end of December 31, 1959?' Look on the third page, 'Loans receivable, Joseph Franco, "$1,000."' (A 70) . . . "*Ladies and gentlemen, I would love to be in a position to make $18,000 and have a union treasury to use as my personal bank account. And that is exactly what we have here.*" (A 72). (Emphasis added.)

II.

The Court instructed the jury (A 73): "It (the information) alleges that he filed a report, a statement, which was false in material respect, and whether or not the report was material is a matter of law for the Court to determine, and I do accept that function, and determine and advise you that the information that was contained in that report was of a material nature." (Petitioner excepted A 75).

III.

After verdict, Government counsel advised the Court that conversations of Petitioner were monitored through electric surveillance on various occasions during 1963-1964, and asked without giving any reason therefor, for a protective order under Rule 16(e) if the Court decided to make the transcripts available to the Petitioner.

Petitioner demanded a new trial for the failure of the Government to earlier disclose the surveillance, and alternatively, requested plenary hearing on the issue of "taint." The Court granted Petitioner the right to inspect the monitored logs, but, over Petitioner's objection, granted the motion for a protective order. After inspection of the logs, Petitioner moved for modification of the protective order on the ground that it was unnecessary, and unduly restricted the defense. Although no reason was advanced by the Government showing a need for the protective order, the Court denied the modification (A 100). The Court then denied Petitioner the right to call witnesses on the issue of illegal surveillance and taint therefrom (A 100, 102), saying in effect that he had read the logs and had found no taint arising therefrom.

REASONS FOR GRANTING THE WRIT.

I. PETITIONER'S CONVICTION IS BOTTOMED IN IRRELEVANT, INCOMPETENT AND PREJUDICIAL EVIDENCE AND COMMENT.

The case against Petitioner was tainted by a great mass of irrelevant, incompetent, and prejudicial evidence and argument; all of which resulted in Petitioner's conviction on the "bad man" theory of justice. The thrust of the Government's case went far beyond any proofs relevant to the relevant issue, and presented to the jury a picture of an evil man who consorted with bad people, who totally dominated and controlled Local 42, who drew a large salary therefrom, and who illegally used the union treasury as his personal bank to finance his high and dissolute living. Such a presentation, sometimes euphemistically called "overkill," *United States v. Silverman*, 430 F.2d 106, 123, et seq. (2nd Cir. 1970), undermines fair trial; *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716; *United States v. Wortman*, 326 F.2d 717, 729 (7th Cir. 1967); *United States v. Wolfson*, __ F.2d, __ (2nd Cir. 1970); *United States v. Greene*, 400 F.2d, 847, 848 (6th Cir. 1968); and in this case reaches constitutional dimension as violative of due process.

The Court of Appeals erroneously ruled that certain of the evidence complained of was properly admitted. It justified the showing to the jury of the year end 1959 statement of Local 42 reciting thereon an outstanding loan to Petitioner saying "the report was relevant to show that the union did make what it considered a loan to Franco, whether in 1959 or otherwise" (*infra*, p. 26).

However, the Government's case was limited to the items set out in the Bill of Particulars, and the proof showed that each of the amounts set forth in the Bill of Particulars was repaid by Petitioner on December 14, 1959.

Indeed, the Government in summation strongly relied on repayment as proof of the charge. The Court of Appeals thus errs as to relevant law both with respect to what it says and what it does not say. There is no relevance to the fact that the union made a loan to Petitioner, per se, since a loan, qua loan was illegal neither before or after Landrum-Griffin. Thus, if the loan was made in a year other than 1959, it would be totally irrelevant, and the evidence should not have been admitted. If the loan was found by the jury to have been made in 1959, the prejudice is sharpened. In such event the jury would perforce believe and be prejudiced by a willful failure to report yet another loan in the 1959 LM2 report. The fact that the court below instructed the jury to consider only loans listed in the Bill of Particulars does not cure the vice. See *Wortman, supra,* 326 F.2d at 729 quoting from *Krulewitch v. United States, supra.**

The Court of Appeals similarly dismissed the discovery by the jury of another 1959 loan to Petitioner set out in the executive board minutes (GE 14). The trial court, after the jury discovered such minutes during deliberations, instructed the jury that ". . . this is not involved . . ." (*infra,* p. 29) and the Court of Appeals reasoned: "No request for a better handling of the matter was made. We do not consider that defendant was unduly prejudiced by the jury's discovery of the quoted Minutes relating to the $1,500 loan; neither were his substantial rights affected. Fed. R. Crim. p. 52." However, when GE 14 was offered Petitioner had objected to its introduction on the basis that it was not qualified. The only reason for the admission of the minute book in evi-

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* The prosecution argued during summation that the $1,000 loan shown on GE 13 proved guilt (A 70).

dence (A 67-68) was to show by a minute of October 1960 that not until 1960 was an examination of 1959 disbursements made by the Union's executive Board, *ergo* Petitioner had repaid the loans listed in the Bill of Particulars before the Executive Board disapproved them; i.e. he himself must have considered them loans. And the Government so argued to the jury. At best the court should have limited admission of GE 14 to the relevant meeting, plus the admission of Petitioner that nothing else appeared.

However, after reassurance by Government counsel that nothing irrelevant appeared in the Book (A 68), the Court permitted the entire minute book to go to the jury. As a result, the jury had placed before it irrelevant, immaterial and prejudicial evidence of another 1959 loan illegally not disclosed. Under these circumstances, there can only be a reversal. *United States v. Wortman,* 326 F.2d, 717, 729 (7th Cir. 1967). Both *Wortman,* and *Krulewitch v. United States,* 336 U.S. 440, 69 S. Ct. 716, make it plain that once a hodge podge of prejudicial matter reaches the jury, a cautionary instruction is unavailing. Once the damage is done, request for a "better handling of the matter" is meaningless.

Extended argument on each irrelevancy offered would unduly protract this petition. It is enough to state that the evidence admitted, and argument made, pictured Petitioner as using union money to improperly go to a Teamster's convention,* to buy whiskey for himself under the guise of buying it for someone else (A 69-70), to go to Florida to an expensive motel owned by the Teamsters

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* In summation the prosecution argued, "What is a Teamster's convention. He belongs to Local 42. He is not a Teamster." (A. 69.)

(A 48),* and all in a rubric in which Petitioner evilly exercised total dominion** over Local 42 fiscal affairs.***

The effect of such overkill is to convict for crimes, and supposed evils in not even crimes not included in the charge, thus affording the defendant neither fair trial nor due process of law. To fragment the errors, as the Court of Appeals did, and thus find that no one standing alone is prejudicial misconceives the argument. It is the sum of the parts that creates fundamental unfairness.

II. A CHARGE TO THE JURY THAT INFORMATION CONTAINED IN A REPORT IS MATERIAL IS ERRONEOUS WHEN UNDER THE CIRCUMSTANCES MATERIALITY DEPENDS UPON A FINDING OF FACT BY THE JURY.

The trial court's charge to the jury that the "information contained in the report was of a material nature" was erroneous. The Sixth Circuit however endorses that charge saying: "The question of whether the information contained in the LM2 report was of a material nature was one of law. *Sinclair v. United States,* 279 U.S. 263, 298, 73 L. Ed. 692, 700 (1929); *United States v. Ivey,* 322 F.2d 523, 529 (4th Cir. 1963). In the total context of the charge, the accused instruction was proper."

The Court of Appeals thus misinterprets *Sinclair, supra,* to mandate that in all circumstances a court ruling

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* The Court of Appeals treated the argument that the Teamsters were currently in popular disapprobation as a point without merit.

** "The danger in admitting evidence of this sort is that the jury may infer that the possession of such power is evidence of bad character." *U. S. v. Silverman, supra,* 430 F.2d at 123; citing McCormick, Evidence, Sec. 157 at 327-31 (1954).

*** In closing, Prosecutor Ritchie argued: "Ladies and gentlemen, I would love to be in a position to make $18,000 and have a union treasury to use as my personal bank account. And that is exactly what we have here."

of materiality is proper, nay even required. While in the context of *Sinclair* that was all that was necessary, materiality here, and in similar circumstances, e.g. omissions in tax reports, etc. is a mixed question of law and fact, and must be submitted to the jury under proper instructions. It is not enough to make a statement to the jury in the misleading manner that the court made it here. The issue before the jury was not whether the information in the LM2 report was material but whether *information omitted from the report was of a material nature.* It was the court's duty to explain carefully to the jury that fact, and that (1) if the jury found that the Petitioner had failed to report any of the amounts set out in the Bill of Particulars willfully; (2) and that if it found that any of those amounts were in fact loans, then (3) such information which was not disclosed was of a material nature. The instruction of a court under these circumstances must be very carefully given and failure to do so must result in reversal. *Luse v. United States,* 49 F.2d, 241, 245 (9th Cir. 1931). The court's ruling at the outset of his charge that the information contained in the LM2 report was of a material nature was highly misleading, and, in effect, was a partial direction of a guilty verdict against Petitioner. In context, the jury could but understand that something material had been omitted from the report and it was only called upon to determine whether that omission was willful.

Grant of certiorari on this issue thus is important because the ruling below endorses an erroneous charge as a correct one; an issue which will likely recur both with respect to the Landrum-Griffin Act, and similar statutes.

III. THE TRIAL COURT IMPROPERLY RESTRICTED PETITIONER'S RIGHTS WITH RESPECT TO THE ILLEGAL SURVEILLANCES ADMITTED BY THE GOVERNMENT.

A.

A short time after trial the Government admitted that it was in possession of logs of conversations in which the Petitioner had participated and obtained by the Government by illegal electronic surveillances. The Court permitted Petitioner and his counsel to survey the logs but placed the Petitioner and his counsel under restriction pursuant to *Federal Rules of Criminal Procedure* (Rule 16(e)). No reason was given for the restriction. The ensealing of these particular logs served no useful purpose. *Alderman v. United States,* 394 U.S. 165, 22 L. Ed. 2d 176 (1968) authorized the trial court, if appropriate, to make order against disclosure, when matters such as the national security might be involved. Here there was no showing that restriction against disclosure was necessary. The Court per se held that *Alderman* permitted the restriction.

Restriction under 16(e) should not be imposed unless reasonably necessary, as resultantly the defense is placed at disadvantage in investigation and trial preparation.

B.

Moreover, in *Alderman, supra,* the court held that once electronic surveillance is demonstrated in violation of Fourth Amendment rights, the Defendant is entitled to a full hearing on whether or not such surveillance resulted in prejudice, and tainted the conviction, *Alderman, supra,* 394 U.S. at 182.* Here the trial court denied Petitioner's

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* The question of whether the surveillance invaded Fourth Amendment rights of the Petitioner may be determined *ex parte*

(Continued on following page)

motion for hearing notwithstanding the illegality of the surveillance admitted by the Government (A 102) notwithstanding *Alderman* mandates hearing be granted. This case was no different than *Alderman,* or the many in which new hearings were granted in *Giordano* by footnote. In those cases, the Court ordered the District Court to grant hearings to develop the relevant facts and to decide whether the Government's electronic surveillance was unlawful and, if so, to determine whether such surveillance might have tainted the conviction. The trial court's action here, as affirmed, denigrates those decisions.

C.

Finally, this case calls for a resurrection of the doctrine enunciated by *Schipani v. United States,* 385 U.S. 372 (1966), *Black v. United States,* 385 U.S. 26, 29 (1966), and *O'Brien v. United States,* 386 U.S. 345 (1967), cf. *Kolod v. United States,* 390 U.S. 136 (1968). Under similar circumstances new trials were ordered for those defendants by the Court for failure of the Government to make pre-trial disclosure of illegal electronic surveillances. The Government, notwithstanding its undertaking for the past several years to the Supreme Court, deliberately failed until after conviction to disclose illegal electronic surveillances and only then, immediately post conviction, made the disclosure for the first time. This active failure by the prosecution to comply with the requirements laid down in a long line of cases, and in an apparent deliberate

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(Continued from preceding page)

in camera by the trial judge, Stewart, J. concurring, in *Giordano v. United States,* 394 U.S. 310, 22 L. Ed. 2d 297 (1969). But here, there was no question after a simple reading of the logs that indeed the Fourth Amendment rights of the Petitioner were invaded, i.e. that he had "standing." He was therefore entitled to a hearing on this question after examination of the logs.

violation of the undertaking by the Department of Justice to the Supreme Court must be scored by reversal.* When the "undertaking" was made by the Solicitor General it related to cases in which conviction was already a fact and the cases were returned to the trial court for hearing on the "taint" issue alone. But patently this court did not intend to sanction a course of future nondisclosure until post conviction. *Schipani,* and its progeny mandated pre-trial disclosure on pain of reversal. Failure to revalidate *Schipani* here will result in perpetuation of a policy of non-disclosure of Fourth Amendment violation by prosecutors until post conviction—a policy plainly violative of Supreme Court mandate. As a policy matter, pre *Alderman* and *Giordano,* post trial hearings could be justified since the Justice Department did not earlier have available the guidelines mandated by those cases. Post *Alderman* the excuse does not exist, and search and disclosure should be made pre trial, not post conviction.

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* The Court of Appeals (*infra* at 32) says: "There is no challenge to the asserted facts that no one who had to do with preparation for and conduct of the prosecution was aware of the surveillance until after the trial . . ." But the fact is Petitioner sought to call Mr. Dehan, the Chief "conductor" of the prosecution to inquire into the relevant facts, but the trial court refused to permit this and denied any hearing to Petitioner (A 100-102). Challenge was made (A 100-101) but the trial court refused to hear any evidence (A 102).

IV. PETITIONER'S CONVICTION RESTS IN PART ON FAILURE TO DISCLOSE ALLEGED LOANS NOT REQUIRED BY THE ACT TO BE DISCLOSED.

Sec. 437(b) provides that when a "person required to file a report . . . for only a portion of . . . a fiscal year (because the date of enactment of this Act occurs during such person's fiscal year or such person becomes subject to this Act during its fiscal year) such person may consider that portion as the entire fiscal year in making such report." Accordingly, for the year 1959 the only period for which disclosure was required was from September 14, 1959 to December 31, 1959 (cf. *IBT v. Goldberg* (C.A. D.C. 1962) 303 F.2d 402).

Nonetheless, the Bill of Particulars charged and evidence was admitted of undisclosed claimed loans made for March 23, 1959 in the amount of $130.50 (GE 3), and August 3, 1959 in the amount of $73.79 (GE 4).

Petitioner was convicted, in part, of failing to disclose two alleged loans which the Act did not require him to disclose; he was convicted of omissions which were not crimes.

CONCLUSION.

A Writ of Certiorari to review the ruling below should be issued.

Respectfully submitted,

MOSES KRISLOV,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeals.

No. 19,723.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH V. FRANCO,
Defendant-Appellant.

Appeal from U. S. District Court
for the Eastern District of Michigan.

Decided and Filed November 30, 1970.

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

O'SULLIVAN, Senior Circuit Judge. Appellant, Joseph V. Franco, appeals from judgment entered upon a jury verdict finding him guilty of violating Section 209(b) and (d) of the Labor Management Reporting Disclosure Act (Landrum-Griffin), 29 U.S.C. § 439(b) and (d), by filing a false financial report of the 1959 affairs of Local 42 of the General Industrial Employees Union. In 1959, appellant was the Secretary-Treasurer of Local 42 and signed and caused to be filed with the Secretary of Labor of the United States the report identified as Form LM-2. The falsity charged was the alleged failure of Franco to set out in such report an accurate statement of loans that had been

made to him during the year covered by the report, as required by Section 202(b)(4) of the Act, 29 U.S.C. §431 (b)(4).

The relevant statutes read as follows:

"§ 431. Report of labor organizations

* * *

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail, as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

* * *

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;"

"§ 439. Violations and penalties.

* * *

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * *

(d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false."

Schedule H of Form LM-2—under Loans Made by Organization—set out that during the relevant year, 1959, one loan out of union funds had been made to Franco in the amount of $300, for which Franco had given his sixty day note. Upon demand for a Bill of Particulars, the government advised that the unreported loans made to Franco were:

March 23, 1959	$130.50
August 31, 1959	73.79
September 22, 1959	500.00
September 29, 1959	52.32
October 5, 1959	250.00
October 5, 1959	500.00
October 23, 1959	500.00
November 18, 1959	314.31

Evidence showed that on the foregoing dates and in the specified amounts, checks were drawn on the Local's bank account, all signed by Franco and countersigned by Eugene Bashor, then president of the Local. Bashor testified that he was in the habit of countersigning the Local's checks in blank to avoid the necessity of being contacted each time a check was needed. On the stub of each of the checks here involved was a notation which, in substance, said, "to be refunded by J.F." On one of the stubs there was a notation that the amount thereof—$300.00—was repaid on July 1, 1959. The stubs of all of the other checks contained the notation "refunded by J.F. on 12/14/59." The evidence showed that three of these checks, each in the amount of $500, and one in the amount of $314.31, were used to pay accounts charged on Franco's personal American Express Company credit card, for items not properly chargeable to Local 42. The other checks listed in the bill of particulars were also used to pay accounts not properly chargeable to the Local. The relevant statute

did not limit information to loans unpaid at the end of the reporting period. So if the various withdrawals by Franco, totalling upwards of $2,300, were in fact direct, or indirect, loans to him, the report was false even if Franco had repaid the money before the end of the covered year.

In his address to us, Franco argues that the evidence was insufficient to permit submission of the issue of his guilt to the jury; he also charges the presence of other reversible errors.

We affirm.

We discuss appellant's claims as follows:

1. *Sufficiency of the evidence.*

It is our view that the monies taken out of the Local's bank account by Franco, especially the $1,814.31 used to pay what he owed on his American Express credit card, had to be either borrowings by him or embezzlement. It is not claimed that they were embezzlements. At the time of the withdrawals, Franco directed his secretary, who was also the Local's bookkeeper, to note on each check stub that the amount taken was to be refunded. Franco's way of attempting to avoid the government's claim that the withdrawals were loans was to say that as the only full time employee of the union, it was permissible for him to use the union's funds for what he considered appropriate uses, and that later if such disbursements were disapproved upon review by the Executive Committee, he would be required to refund the involved amounts. But the record contains nothing which would forbid a jury's conclusion that neither Franco nor the Local's Executive Committee could have looked upon the payment of Franco's personal bills as legitimate expenses of the Local. Also, the Minutes of the Executive Board Meetings contain nothing to indicate that the Board had ever given con-

sideration to any of the items set out in the government's bill of particulars. It was Franco's contention, supported by two former officers of the Local, that the union did not look upon his withdrawals as loans. These witnesses did not, however, provide a substitute definition and their conclusional observation did not foreclose a contrary conclusion by the jury.

Familiar law teaches that in testing the sufficiency of the government's evidence to withstand a motion for directed acquittal, "the trial court, as well as the appellate tribunal, must view the evidence and the inferences that may justifiably be drawn therefrom, in the light most favorable to the government." *United States v. Decker,* 304 F(2) 702, 705 (6th Cir. 1962). See also *Glasser v. United States,* 315 U.S. 60, 80, 86, L.Ed. 680, 704 (1942); *United States v. Day,* 394 F(2) 335 (6th Cir. 1968); *United States v. Compton,* 355 F(2) 872 (6th Cir. 1966), *cert. denied,* 384 U.S. 951 (1966); *United States v. Carter,* 311 F(2) 934 (6th Cir.), *cert. denied,* 373 U.S. 915 (1963). We obey such rule by our affirmance.

2. *Evidentiary rulings.*

Local 42 employed the firm of Aronoff and Grossberg, certified Public Accountants, to review and audit the Local's books and assist in preparation of needed reports. Among records produced by the union, was a Financial Report of Local 42 for the year ending December 31, 1959, prepared by the above accounting firm. It was marked as Government Exhibit 13. Upon cross-examination by the government, a former recording secretary of the union identified the report as "a statement of assets and liabilities of the local union." This report was part of the Local's books and records. Under the caption "Loans Receivable —December 31, 1959" was an item—"Joseph Franco

$1,000." Defendant's initial objection to this exhibit was that the witness who had identified it had not prepared it, and that it could only be identified by the individual who had prepared it, who "can vouch for the accuracy of the figures." No objection was made to its relevancy and materiality. Defense counsel asked the witness whether there was anything on the report which would indicate that the $1,000 loan to Franco "was actually incurred in the fiscal year this report refers to." The witness said no. Franco made no explanation of the item. Neither did the defense call any representative of the accounting firm to testify. No objection was made to testimony that the exhibit was part of the record of the Local and had been prepared by its auditors. It was properly admitted into evidence. Irrespective of its authenticity as to amount, the report was relevant to show that the union did make what it considered a loan to Franco, whether in 1959 or otherwise. If, in fact, the $1,000 loan had been made during a period not covered by the LM-2 report, as defense counsel attempted to establish, no prejudice was visited upon defendant by its admission. What was done was a proper exercise of the trial judge's discretion. A $1,000 loan was not listed in the bill of particulars and the District Judge carefully instructed the jury that they were to consider only the loans so listed. If any rule of evidence was offended by the introduction of this exhibit, no substantial rights of defendant were affected.

Other evidentiary rulings of the District Judge are claimed to have been erroneous. Objections that would save such rulings as questions for review were not made in the trial court. We find no fault in the District Judge's accused rulings and in all events, we will not notice them as plain error, Fed. R. Crim. P. 52.

3. *The Court's instructions.*

At the beginning of his charge, and after reading the information which contained the charge against appellant, the District Judge said:

> "It [the information] alleges he filed a report, a statement, which was false in a material respect, and whether or not the report was material is a matter of law for the Court to determine, and I do accept that function, and determine and advise you that the information that was contained in that report was of a material nature."

This was followed by detailed explanation of the nature of the charge against Franco, the government's burden, the presumption of innocence and other usual and correct instructions. Among them was the following:

> "The Information which I read to you is not evidence of the defendant's guilt. It is merely the formal manner by which the Government accuses a person of a crime in order to bring him to trial. When he is arraigned in court, he and his attorney are furnished with copies of the Information which apprises them of what they are going to be required to meet in the subsequent trial. The jury must not be prejudiced against a defendant because an Information has been returned against him."

The question of whether the information contained in the LM-2 report was of a material nature was one of law. *Sinclair v. United States,* 279 U.S. 263, 298, 73 L.Ed. 692, 700 (1929); *United States v. Ivey,* 322 F(2) 523, 529 (4th Cir. 1963). In the total context of the charge, the accused instruction was proper.

4. *Prejudice from Exhibit 14.*

During trial the government introduced Exhibit 14 which contained Minutes of meetings of the Executive

Board of Local 42. It was offered to impeach appellant's claim that the checks drawn on the Local's account would be passed upon in due course by the Local's Executive Board. The exhibit disclosed that no such consideration was given by the Executive Board to Franco's withdrawals from the Local's bank account. This exhibit, with others, was given to the jury for use during deliberation without setting any limits to their investigation of its contents. No objection was made to such practice. After their deliberation had begun, the jury sent a message to the judge as follows:

> "We would appreciate clarification of loan agreement as shown on page 142 of Minutes of meeting."

The jury, on its own, had come upon Minutes of a meeting of the Executive Board held on July 27, 1959. They contained the following:

> "Request made by Brother Franco that Local 42 stand good for $1,500 (fifteen hundred) dollars owed to Universal Credit which will be repaid by Brother Franco before Dec. 31st.
>
> "Present and concurring in this decision to allow Brother Franco this courtesy was Bashor, St. Denis, Neville, Wilson, and Bellfy."

No specific reference to this entry had been made when Exhibit 14 was introduced in evidence; nor was any reference made thereto during trial. The $1,500 loan was not listed in the bill of particulars. After discussion between the Court and counsel as to how best to handle the situation, the District Judge told the jury that the $1,500 loan was not listed in the bill of particulars and then said:

> "The Government, I have been informed by its counsel, has never considered this transaction with the Universal Credit Company reflected in this minute as being a matter that concerned the Government in relation to the matter we have here for consideration, and Mr.

> Ritchie has assured me of that fact, that this is not involved in this litigation at all."

No request for a better handling of the matter was made. We do not consider that defendant was unduly prejudiced by the jury's discovery of the quoted Minutes relating to the $1,500 loan; neither were his substantial rights affected. Fed. R. Crim. P. 52.

5. *Reference to Teamsters Union.*

Among other expenses charged on Franco's American Express Credit Card and paid out of the union's funds were some that, in part, related to his attendance at a convention in Florida. The recording secretary of the Local had said:

> "I think this was when Joe was down in Florida, that there was a Teamsters thing or something. I don't know but I think it was the Teamsters. * * * And he stayed there part of the time and then used Local 42's credit card. And it was kind of his own vacation * * *."

During the course of Franco's direct testimony, he identified one charge on the credit card as being a bill from the Castaways in Miami Beach. Thereupon, the District Judge inquired whether that motel was the one "that is owned by the Teamsters." Franco answered, "Not that I know of." No attention was paid to the foregoing at trial or in the motion for new trial. It is now claimed that the asking of the question irreparably prejudiced defendant, "In light of the current disapprobation of this Union in the public mind." This point is without merit.

6. *Electronic surveillance.*

The jury's verdict was returned on January 3, 1969. By letter dated January 20, 1969, the United States De-

partment of Justice advised Honorable Thomas P. Thornton, who presided at Franco's trial, as follows:

> "Please be advised that pursuant to the review of pending cases undertaken by the Department of Justice in order to ascertain the possible involvement of electronic surveillance, we have established that conversations of the defendant Joseph Franco were monitored through electronic surveillance on various occasions during 1963 and 1964."

This letter, signed by James E. Ritchie, who had conducted the prosecution of Franco, went on to say that there was no connection between the monitored conversations and "the evidence or investigative leads in the present case." The letter also advised that the transcripts or logs of the electronic surveillance were available for *in camera* inspection by the Court, and that if they were to be made available to the defendant, a protective order under Rule 16(e) of the Fed. R. Crim. P. would be sought to limit the out-of-court usage of the information contained in the transcripts.

Thereafter, the District Judge ordered that the involved logs be submitted to appellant and his attorney. Such examination by Franco and his attorney was to be made only in the Chambers of the Court or at the office of the Department of Justice in Detroit, Michigan. The order further forbade disclosure of the contents of the logs to others except by permission of the District Judge. A motion to modify the protective order was made and denied. Appellant's statement of the relevant question for review reads:

> "The Court erroneously failed to either grant a new trial or a hearing to defendant on the ground that the United States had engaged in an illegal electronic surveillance and placed the defendant and his counsel

under unwarranted restriction with respect to the illegally obtained data."

In denying appellant's motion for new trial, the District Judge, referring to the electronic surveillance, said:

> "Government counsel, in the person of Mr. James E. Ritchie, Special Attorney, United States Department Justice, representing the Government in the trial of this cause, informed the Court that neither he nor the agency in charge of the investigation that brought about the prosecution of the defendant, namely the Department of Labor, had any notice prior to the termination of the said trial of the existence of the transcripts of the electronic surveillance regarding the defendant. This Court has explicit faith in that representation. The transcripts of the electronic surveillance were made available to defendant and his counsel, Mr. Krislov, on April 7, 1969; at a time subsequent to this date they were made available to the Court and were examined carefully and in detail by the Court—all prior to the argument by counsel on the motion for a new trial. *These transcripts reveal nothing that had anything to do with the investigation and/or trial of this cause. The Court concludes that the electronic surveillances were in no degree prejudicial to the defendant's constitutional rights surrounding this prosecution and trial.* This Court is not conscious of any mandate of the United States Supreme Court that requires the granting of a new trial because of the lack of pre-trial disclosure of transcripts of electronic surveillances by any person and/or agency that had no prior knowledge of such transcripts." (Emphasis supplied.)

Although opportunity was given to have the transcript of the surveillance sealed and returned to this Court, it has not been made a part of the record before us. There is no challenge to the correctness of the District Judge's finding that the transcripts "reveal nothing that had any-

thing to do with the investigation and/or trial of this cause."

There is no rule that illegal surveillance, per se, calls for a new trial even though the disclosure of such surveillance was not made until after trial. We do not read *Schipani v. United States,* 385 U.S. 372 (1966); *Black v. United States,* 385 U.S. 26 (1966); *O'Brien v. United States,* 386 U.S. 345 (1967); or *Kolod v. United States,* 390 U.S. 136 (1968), as announcing, as asserted by appellant, a per se rule that there must be "pretrial disclosure on pain of reversal." There is no challenge to the asserted facts that no one who had to do with preparation for and conduct of the prosecution was aware of the surveillance until after the trial and the jury's verdict. We are satisfied that the procedure directed and carried out by the District Judge was obedient to the commands of *Alderman v. United States,* 394 U.S. 165 (1968). It was there decided that submission of transcript of the surveillance to counsel for a defendant was to be made without waiting an *in camera* review by the District Judge. That was done here.

Appellant also charges error upon the District Judge's refusal to allow a full hearing on whether or not the surveillance prejudiced and tainted his conviction. It is suggested that *Alderman, supra,* requires such a hearing. In considering whether the relevancy of the accused surveillance should not be left to the exclusive determination of the trial judge's *in camera* examination, the Court in *Alderman* said:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to

> one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." 394 U.S. at 182.

But here there is no suggestion that anything might be discovered by examination of any witness or witnesses which would tend to establish that Franco's conviction, or the investigation that preceded it, was in any way aided by electronic surveillance. When this issue was argued during the hearing on motion for a new trial, appellant, after study of the transcript of the surveillance by both appellant and his attorney, was unable to come forward with any evidence of possible taint. We think the District Judge handled the matter correctly. Appellant was given sufficient opportunity to show that his conviction was tainted; he was unable to do so. See *Alderman, supra,* at 183.

Appellant also asked that he and his counsel—contrary to the protective order—be allowed to disclose the contents of the transcripts to an attorney who was representing Franco in another criminal case. We are not advised of any relevancy of the transcript to the other criminal case. If the accused surveillance would be material to some other criminal charge against Franco, it can be made the subject of investigation there. We assume the transcript of it will be preserved.

Judgment affirmed.

APPENDIX B.

Opinion of District Court Denying Defendant's Motion and Supplemental Motion for a New Trial.

(Filed June 10, 1969.)

Cr. No. 41,350.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH V. FRANCO,

Defendant.

At a session of said Court held in the Federal Building, Detroit, Michigan, on June 10, 1969.

PRESENT: HONORABLE THOMAS P. THORNTON,
United States District Judge.

The defendant moves for a new trial after being convicted by a jury verdict on an information which alleges as follows:

> "That on or about the 29th day of March 1960, in the Eastern District of Michigan, Southern Division, JOSEPH FRANCO, who was then and there an officer of Local 42, General Industrial Employees, a labor organization engaged in an industry affecting commerce, all within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401 *et seq.* hereinafter referred to as the Act, did wilfully make and cause to be made a false statement of a material fact in a financial report, known as a Labor Organization Financial Report (LM-2), which was

filed and caused to be filed by the said JOSEPH FRANCO, with the Secretary of Labor of the United States by virtue of said Act (29 U.S.C. 431(b)), and which purported to report the financial condition and operations of the said labor organization, for the fiscal year ending December 31, 1959, well knowing said statement was false in a material respect in that the number and amount of direct and indirect loans made to officers, employees or members, which aggregated more than $250 listed in said financial report, for the period reflected therein, were less than the number and amount in fact made; all in violation of the Act (29 U.S.C. 439(b), (d)), (18 U.S.C. 2(b))."

The first ground urged by defendant in support of his motion and supplemental motion for a new trial is as follows:

"The Court erred in denying the Motion for a judgment of acquittal in that the Government failed to establish a prima facie case."

An analysis of the evidence presented by the Government in support of the charges contained in the Information in this cause establishes the fact that there is no merit to this contention.

The second ground set forth in his motion and supplemental motion is as follows:

"The Court erred in instructing the jurors as a matter of law that the allegedly false statements contained in the LM-2 Report (Exhibit 1) were material, thus invading the province of the fact finders and in essence directing a partial verdict of guilty."

The part of the charge of the Court involved in the defendant's second season for a new trial is as follows:

"It [the Information] alleges that he filed a report, a statement, which was false in a material respect, and

whether or not the report was material is a matter of law for the Court to determine, and I do accept that function, and determine and advise you that the information that was contained in that report was of a material nature."

United States v. Ivey, 322 F.2d 523, 529 (4th Cir. 1963) is authority for the above and contains the following holding:

"Defendants excepted to this part of the charge, contending that 'materiality' was a question of fact for the jury, rather than a question of law for the court. In their brief, counsel for defendants renew this contention, although they admit that, by the weight of authority, the question of materiality is a question of law. We hold that the question of materiality was a question of law in this case, and that the court's charge was proper. Sinclair v. United States, 279 U.S. 263, 298, 49 S. Ct. 268, 73 L.Ed. 692; Weinstock v. United States, 97 U.S. App. D.C. 365, 231 F.2d 699, 701; United States v. Clancy (7 Cir.), 276 F.2d 617, 635."

The defendant's third contention in support of his motion for a new trial is as follows:

"The Court erred in admitting into evidence over objection of defense counsel the balance sheet prepared by CPAs for Local 42 where the record was absolutely devoid of any evidence tending to lay a proper foundation for the admission of same, no one having testified as to the manner in which the report was compiled or having testified as to its authenticity."

The transcript of the trial proceedings reveals the following testimony that was brought out on direct examination of the defendant:

"Q. Mr. Franco, may I ask you how that report was put together? That is, the mechanics by which

the information was gathered which is contained in Exhibit 1. [Exhibit 1 is the LM-2 report.]

A. The same as we would normally go through a financial report ending the year of whatever year it may be. Our books and records are turned over to our CPA, and our CPA gives us a financial report, and these LM-2's are prepared by the CPA, given to us, and that is how we end up with them."

On cross-examination the Government had the defendant identify Government Exhibit 13 as a financial report for Union Local 42 for the year ending December 31, 1959. Exhibit 13 is identified by defendant as follows:

"Q. Government Exhibit 13 is a financial report for the year ending December 31, 1959, is it not?

A. Yes."

The subject matter contained in Exhibit 13 was relevant to the subject matter of the defendant's direct testimony, and the failure of the defendant to offer the exhibit in support of his testimony does not foreclose the Government from using the contents of the exhibit in relation to its cross-examination.

As a fourth ground in support of his motion for a new trial the defendant further alleges:

"The Court erred in allowing into evidence over objection of defense counsel the minute book of Local 42 where the record was completely devoid of any testimony that said minute book constituted all of the minutes of Local 42 for the period in question, the fact of the matter being that said minute book did not contain all of the minutes of said Local 42 for the year 1959 and several of the missing minutes, copies of which have been discovered by the defendant subsequent to the trial upon examination of his records, were probative of the fact that during the year 1959 the Executive Board from time to time did pass upon expenditures made by him, which said minutes would

have corroborated his testimony and the testimony of the Recording Secretary, Mr. Belfey; that the failure of the Government to produce the entire minute book for the year 1959 had the effect of depriving the defendant of a fair and impartial trial (testimony in support of this alleged error by way of admission of said missing records will be adduced at the time of the hearing on the Motion for New Trial)."

Even assuming the above to be true, it does not alter the fact that the Government offered the minute book in evidence in the form in which it was furnished by defendant to the Government at its request. *United States v. Kampas*, 189 F. Supp. 720, 722 (W.D. Pa. 1960) is authority for the following:

"Evidence available at trial but not probed does not fall into the category of newly-discovered evidence. Cf. United States v. Bertone, 3 Cir., 1957, 249 F.2d 156, at pages 160, 161."

The supplemental motion for a new trial alleges as follows:

"(1) There is incorporated herein all the reasons set forth in the original Motions for New Trial filed in this Court.

(2) (a) Subsequent to trial and conviction herein, counsel James E. Ritchie, Special Attorney for the United States Department of Justice, informed the Court that conversations of the Defendant Joseph V. Franco, were monitored through electronic surveillance on various occasions during 1963 and 1964. Pursuant to the guide lines laid down by the United States Supreme Court in former cases, such information should have been furnished to the Court pre trial, and the relevancy of the surveillances determined on hearing prior to trial. The failure of the Government to reveal pre trial such known information in accordance with the mandate of the United

States Supreme Court cases requires the granting of a new trial that such requirement of pre trial disclosure be effectuated.

(b) Defendant alternatively moves that the transcripts of the monitored conversations be made available to the Defendant prior to any hearing on the Motion for New Trial; and that full plenary hearing be subsequently ordered to determine if the surveillances undermine the constitutionality of the convictions here, the extent of the monitoring, and the existence of any monitored conversations or surveillances other than disclosed."

Government counsel, in the person of Mr. James E. Ritchie, Special Attorney, United States Department of Justice, representing the Government in the trial of this cause, informed the Court that neither he nor the agency in charge of the investigation that brought about the prosecution of the defendant, namely the Department of Labor, had any notice prior to the termination of the said trial of the existence of the transcripts of the electronic surveillances regarding the defendant. This Court has explicit faith in that representation. The transcripts of the electronic surveillances were made available to defendant and his counsel, Mr. Krislov, on April 7, 1969; at a time subsequent to this date they were made available to the Court and were examined carefully and in detail by the Court—all prior to the arguments by counsel on the motion for a new trial. These transcripts reveal nothing that had anything to do with the investigation and/or trial of this cause. The Court concludes that the electronic surveillances were in no degree prejudicial to the defendant's constitutional rights surrounding this prosecution and trial. This Court is not conscious of any mandate of the United States Supreme Court that requires the grant-

ing of a new trial because of the lack of pre-trial disclosure of transcripts of electronic surveillances by any person and/or agency that had no prior knowledge of such transcripts.

Paragraph 3 of the supplemental motion for a new trial reads as follows:

> "The Court erred in permitting, and prosecuting counsel committed prejudicial error in examining the Defendant with respect to $1,000.00 in loans allegedly shown on Exhibit 13, purportedly an accountant prepared 1959 year end statement for Local 42. This $1,000.00 was shown on the year end statement as being yet another loan due from Defendant (not shown by the LM2). The LM2 form admitted into testimony as Exhibit 1, indicated that the Defendant had made from the Union during the year but one loan of $300.00. The alleged loans charged by the information were according to the evidence, all paid on December 14, 1959. Accordingly, a statement indicating that there was outstanding at December 31, 1959 loans from Defendant in the amount of $1,000.00, which present to the jury an inference of an admittedly undisclosed loan which Defendant had failed to cause to be disclosed on the LM2 form. This inference that another crime had been committed is highly prejudicial, violating Defendant's rights to be tried for the crime for which he has been indicted and none other."

The subject matter of the defendant's claim in paragraph 3 of his supplemental motion for a new trial involves a portion of the Government's cross-examination of the defendant from Exhibit 13 which had previously been admitted into evidence. The testimony involving the claim is as follows:

> "Q. (By Mr. Ritchie, continuing) I will ask you to examine that report, Mr. Bellfy, and see if there is

reflected therein any loans to Mr. Joseph Franco for the fiscal year ending December 31, 1959, the pertinent dates of that report?

A. Well, I am not an accountant –

Q. (Interposing) I am not asking you as an accountant. I am asking you to examine that report and tell me whether or not any loans are reflected by your CPA?

A. It says, 'Loans receivable.' This is what you are referring to and this is what I am to read? Yes, there are several loans.

Q. Is there any loan to Joseph Franco?

A. There is.

Q. What is the amount?

A. $1,000.

Q. Would you argue with your CPA's as to whether or not monies expended were loans or not?

(No response)

Q. Would you, as a member of the executive board, argue with your CPA's who you had hired as to whether or not this money is considered to be a loan or not?

Mr. Barris: I object to that, your Honor. There is no showing that $1,000 in any way pertains to any of the items in evidence here.

The Court: I don't think we are talking about the authenticity of the audit. We are talking about whether or not it mentions anything about loans. And, if it does,—and it apparently does, because he so recited it—now, whether or not he is arguing with his accountant, of course, is something for his own consideration.

Mr. Ritchie: If the Court please, I will withdraw the question.

The Court: All right.

Mr. Barris: All right.

Mr. Ritchie: I have no further questions."

[Redirect examination by Mr. Barris:]

"Q. Now Mr. Bellfy, realizing you are not an accountant, do you see anything on this report which indicates the so-called $1,000 loan by Mr. Franco was actually incurred in the fiscal year this report refers to?

A. No.

Mr. Barris: I have nothing further.

Mr. Ritchie: If the Court please, the document speaks for itself.

The Court: All right.

Mr. Barris: I have nothing further."

* * * * *

[Cross-Examination of Mr. Franco by Mr. Ritchie:]

"Q. Do you recall receiving a subpoena duces tecum in 1963 calling for the books, records, et cetera of Local 42 in your possession?

A. Yes.

Q. Do you recall turning that instrument over in 1963 to Mr. Thomas McKeon?

A. We took all of our records out of our files and submitted them to Mr.—

Q. (Interposing) I will ask you again, then, have you ever seen Government's Exhibit 13?

A. I probably have, but I say it may not be this. But I am going by the fact that it was made up by Aronoff & Grosberg, and I would have to say—

Q. (Interposing) Aronoff & Grosberg were your CPA's in 1959, were they not?

A. Yes.

Q. Government Exhibit 13 is a financial report for the year ending December 31, 1959, is it not?

A. Yes.

Q. The date of that report is what, please?

A. You are talking about this date? (Indicating.)

Q. Yes.

A. March 11, 1960.

Q. So that is some few days prior to your CPA's filling out Government Exhibit 1, is it not?

A. What date is that on there?

Q. I will hand you Government Exhibit 1. (Handing document to the witness.)

A. March 29th. And that was March 11th.

Q. So that is just—you received this report from your CPAs just a few days prior to their filling out this report for you to sign; isn't that true?

A. No. It may not have. We may have gotten this maybe the end of March or first of April.

Q. What is the date of the letter?

A. March 11th.

Q. I will direct your attention to the third page entitled, 'Loans receivable.' Do you see an item in there reflecting your name and an amount of a loan receivable as of December 31, 1959?

A. Yes.

Mr. Barris: Your Honor, I object to that as being irrelevant and immaterial.

Unless it is established that that represents an item—a loan received during the fiscal year, it is irrelevant. The statute only speaks in terms of a loan aggregating more than $250 in the fiscal year.

Mr. Ritchie: Your Honor please, we are offering this as to his credibility.

The Court: I will overrule your objection.

Mr. Barris: Very well, your Honor.

Q. (By Mr. Ritchie, continuing) Do you see an item thereon reflecting your name, Mr. Franco, and an amount?

A. Yes, I do.

Q. Will you tell us that amount, please?

A. $1,000.

Q. All right. I will ask you again, did you read Schedule H of this LM-2, marked Government Exhibit 1, prior to signing it? Isn't that what you testified to on direct examination?

A. If I had read it?

Q. Yes.

A. I don't know if I did. Did I?

Q. You know what you testified to, Mr. Franco. You testified, did you not, you had read it; you are not a bookkeeper; you are not an accountant; you are not a CPA; you may not have understood it; but you read it, didn't you?

A. You mean so far as reading this in full text?

Q. I am asking you, didn't you testify you did read Government Exhibit 1 prior to signing it? Didn't you testify to that on direct examination?

A. If I did, I guess I have.

Q. What amount did you say you borrowed from the union in 1959 on Schedule H?

Mr. Barris: Your Honor, I am going to object. This is a question which is predicated on a false assumption.

The Court: I don't know that it is a false assumption. The examiner is investigating the background of the transaction, and the only way he can investigate it is to ask questions.

Mr. Barris: I appreciate that, your Honor. But there is nothing in that exhibit to indicate that the $1,000 loan mentioned accrued or was obtained during the fiscal year, which is what is reflected in the LM-2.

The Court: And there is nothing in there to say it didn't, either.

Mr. Barris: That is true.

The Court: That is why he is asking the questions.

Mr. Barris: Very well, your Honor."

In the course of the jury's deliberations the foreman sent out a note requesting information as to a fifteen hundred dollar amount which was disclosed in the minute book, Exhibit 14, in possession of the jury. After discussing the subject matter of the jury's request with respective coun-

sel, and by agreement with counsel for the Government and for the defendant, the following information was furnished to the jury:

> "On March 16, 1965, in answer to a request by Mr. Franco's attorney, Mr. Barris, the Government furnished to Mr. Barris and his client, Mr. Franco, a Bill of Particulars, which means it is information in addition to what is contained in the Information. It is a legal proceeding that the defendant is entitled to if he wants more information than furnished here.
>
> And the Bill of Particulars that was furnished to Mr. Franco through his counsel in March of 1965 gives the information that was requested, and that information is: That on or about the following dates, in the amounts stated, the following direct and indirect loans were made to Joseph Franco:
>
> March 23, 1959, $130.50.
> August 3, 1959, $73.79.
> September 22, 1959, $500.
> September 29, 1951, $52.32.
> October 5, 1959, $250.
> October 5, 1959, $500.
> October 23, 1959, $500.
> November 18, 1959, $314.31.
>
> And those are the amounts that have been presented to you as jurors for consideration in this case."

The foregoing information furnished the jury, without objection by defense counsel, clearly establishes the amounts that were to be considered by the jury in its deliberations. Since the Court's admonition shows definitely what amounts could be considered by the jury in this particular case, it must be assumed that the jury conformed to this instruction.

Paragraph 4 of the supplemental motion relates as follows:

> "The Court erred in permitting the introduction of Government Exhibit 14, in toto over objection of defense counsel. Permitting such exhibit to go to the jury without limitation to relevant part presented the jury a mass of prejudicial, immaterial and irrelevant data. The extent to which such immaterial evidence was placed before and considered by the jury is demonstrated by the questions asked by the jury during the course of their deliberations. The Court's charge to disregard portions of such testimony cannot ameliorate the error committed. The extent to which other prejudicial material contained in the Exhibit was considered in deliberation cannot be disclosed without violating the secrecy of deliberations. *United States v. Wortman,* 7 Cir. (1967) 326 F.2d 17." [Correction: This case is cited at page 717.]

We have already discussed this alleged error in our consideration of paragraph 4 of the original motion for a new trial submitted by the defendant's trial counsel. The only additional statement necessary to dispose of defendant's contention in paragraph 4 of the supplemental motion is that the procedure adopted by the Court in answering the jury's request for information was agreed to by Mr. Barris, trial counsel for the defendant. (Transcript at page 220.) *United States v. Bertone,* 249 F.2d 156, 160 states in part

> "The defendant was represented at the trial by counsel of his choice and is bound by his decisions as to trial strategy. * * * [Citations omitted.]"

Paragraph 5 of the supplemental motion alleges as follows:

> "The Court erred in failing to charge a statement that in order for the Defendant to be guilty of willfully violating the law, he must be either conscious of the fact that what he is doing constitutes a violation of the law, or wholly disregards the law and pursues a course without making any reasonable effort to de-

termine whether the plan he is following would constitute a violation of the law or not. *Korholz v. United States*, 10th Cir. (1959) 269 F.2d 897."

Request No. I of the Defendant's Request to Charge reads as follows:

"Members of the Jury, I instruct you that the word 'willful' as used in the crime charged means that the act was committed by defendant voluntarily, with knowledge that it was prohibited by law, and with the purpose of violating the law, and not by mistake, accident or in good faith, that is, that the act was done for a bad purpose."

At the conference in chambers for the purpose of discussing the respective requests to charge of the parties, Government counsel objected to the granting of the defendant's request No. I and the transcript will reveal the fact that the Court felt duty-bound to give the defendant's request No. I, in substance, since it was a proper request, inasmuch as the Information charged that the defendant "did willfully make and cause to be made a false statement of a material fact in a financial report." Because of this allegation of wilfulness in the charging part of the Information, the Court overruled the objection of Government counsel and gave the following charge:

"An act is done wilfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

The Court then continued in the charge with the following:

"A person who knowingly does an act which the law forbids or knowingly fails to do an act which the law requires, intending with bad purpose either to disobey or to disregard the law, may be found to act with explicit intent."

The charge further continued with the following:

> "An act or failure to act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertence or any other innocent reason."

The Court then gave a definition of "intent."

At the conclusion of the entire charge defense counsel did not, and could not, in the light of his request, take any exception to the foregoing excerpts of the Court's charge, his only exception having to do with the Court's charge in relation to "materiality."

The motion for new trial is denied.

THOMAS P. THORNTON,
United States District Judge.

APPENDIX C.

Judgment of the Court of Appeals.

No. 19,723.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH V. FRANCO,

Defendant-Appellant.

BEFORE: PHILLIPS, Chief Judge, McCREE, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

JUDGMENT.

(Filed November 30, 1970.)

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Order of Court of Appeals Denying Rehearing.

No. 19,723.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JOSEPH V. FRANCO,

Defendant-Appellant.

ORDER.

(Filed January 19, 1971.)

Before PHILLIPS, Chief Judge, McCREE, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

THIS CAUSE is before the Court upon petition of Joseph V. Franco for rehearing, and suggestion for rehearing in banc. No request for rehearing in banc has been made by any judge of this Court, and accordingly the petition has been considered and will be disposed of by the panel that originally heard the appeal.

Upon due consideration of the petition for rehearing, IT IS ORDERED that the petition of Joseph V. Franco be, and it is, hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1356

JOSEPH V. FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 21–33) is reported at 434 F. 2d 956. The opinion of the district court denying a motion for a new trial (Pet. App. 34–48) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 19, 1971. The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the information charged the commission of an offense outside the purview of the statute.

2. Whether petitioner was deprived of a fair trial by the admission of certain evidence and the prosecutor's summation.

3. Whether an instruction to the jury removed from the jury's consideration issues which by law were committed to it.

4. Whether the court could forbid general use by the defendant of logs of electronic eavesdropping revealed to the court and the parties, and determined to have had no effect in the prosecution and trial of this case.

STATUTES INVOLVED

The Labor-Management Reporting and Disclosure Procedure Act (29 U.S.C. 401 *et seq.*) provides, in pertinent part:

> § 431. *Report of labor organizations.*
>
> * * * * *
>
> (b) *Annual financial report; filing; contents.*
>
> Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—
>
> * * * * *

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

* * * * *

§ 437. *Time for making reports.*

* * * * *

(b) Each person required to file a report under section 431(b), 432, 433(a), or the second sentence of 433(b) of this title shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 431(b), 432, 433(a), or the second sentence of 433(b) of this title, as the case may be, for only a portion of such a fiscal year (because September 14, 1959, occurs during such person's fiscal year or such person becomes subject to this chapter during its fiscal year) such person may consider that portion as the entire fiscal year in making such report.

* * * * *

§ 439. *Violations and penalties.*

* * * * *

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this subchapter shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(d) Each individual required to sign reports under sections 431 and 433 of this title shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

STATEMENT

After a trial by jury in the Eastern District of Michigan, petitioner, the secretary-treasurer of Local 42 of the General Industrial Employees Union, was convicted on a one-count information charging him with having filed a false financial report for the local with the Secretary of Labor, in violation of 29 U.S.C. 439(b) and (d). By bill of particulars, the government specified that the report for the year 1959 failed to disclose eight loans made to petitioner between March 23 and November 18, 1959, in amounts ranging from $52.32 to $500.00 and aggregating $2,320.92 (A. 4).[1] Petitioner was sentenced to imprisonment for ten months.

The evidence showed that the 1959 report (G.X. 1), required by 29 U.S.C. 431(b), was signed by petitioner in his capacity as secretary-treasurer, and listed only one loan to petitioner during that year—a sixty-day note in the amount of $300.00. However, eight checks had been drawn on the local's bank account, corresponding to the eight loans alleged in the bill of particulars (A. 9–11, 19–23), and the government's proof was that each of these also represented a loan. Each check was signed by both petitioner and the

[1] "A." refers to the appendix in the court of appeals. "G.X." refers to government exhibits.

president of the local, who often signed checks in blank for reasons of convenience (A. 11). None of the checks was made out to petitioner, but the local's records specifically showed that on December 14, 1959, he repaid to the local the funds disbursed by each of these checks (A. 30–31). The local's former bookkeeper further testified that, at petitioner's direction, she had drawn each check and made appropriate notations on the corresponding check stub. In five instances, she had noted that petitioner was to refund the amount disbursed; in two other instances (each involving a $500.00 check) the notation was "J. Franco—credit card"; the notation as to the eighth check showed that petitioner refunded the amount disbursed on December 14, 1959 (A. 24–25).[2] The cash disbursements journal of the local also noted that petitioner was to refund each of the eight disbursements (A. 26–29).[3]

Petitioner's defense—supported by his own testimony and that of the former recording secretary of the local—was that the checks represented disburse-

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[2] The records of the local indicated that this last disbursement was payment of a bill submitted to petitioner for a case of liquor (A. 24–25). The check stub for one of the other disbursements—for $130.50—indicated that it was for "watches" (A. 24).

[3] The evidence also showed that a ninth check, in the amount of $300.00, was drawn on June 11, 1959, with a notation on the stub that it was to be refunded by petitioner (A. 17), and that the amount was refunded by him on July 1, 1959 (A. 30). Neither the bookkeeper nor petitioner himself could say whether this transaction was the $300.00 loan acknowledged on the local's report (A. 32, 49, 57).

ments which he had made on behalf of the local and thereafter repaid when they were disallowed by the executive board (A. 38, 48).[4] The local's minute book (G.X. 14) was introduced in rebuttal (A. 61–62). No minutes in that book reflected either approval or disapproval of any of his expenditures by the board (A. 64).

ARGUMENT

1. Petitioner asserts that he was "convicted of omissions which were not crimes" because two of the "loans" were made prior to the enactment of the statute (September 14, 1959) (Pet. 19). It is true that 29 U.S.C. 437(b) allowed the option of treating that portion of a fiscal year which occurred after the statute's enactment as the entire fiscal year in making the required reports. The report submitted for the local (G.X. 1) did not, however, exercise this option; it instead purported to include all financial transactions occurring during the entire year. Having chosen to report for the entire year, petitioner was required to file a report which truthfully reflected the transactions for that year. Cf. *United States* v. *Knox*, 396 U.S. 77. In any event, petitioner was not charged with specific disclosure omissions, but rather with

[4] The recording secretary testified that the executive board did not consider the disbursements to be loans (A. 44). He explained, however, that some of the disallowed disbursements involved salary advances which petitioner had taken (A. 40), and that $1814.00 of the disbursements were payments made to American Express for expenses incurred by petitioner on his credit card, which were disallowed by the board when petitioner acknowledged that they were of a personal nature (A. 42–43).

falsely reporting fewer loans than were actually made. The evidence established that even disregarding the challenged items (which totalled $204.29), the report understated the loans made by $2,116.63. There was no testimony tending to set the challenged loans apart from the later ones, and thus the conviction was necessarily based on the undisputed understatements as well as the disputed ones.

2. There is no basis for further review of petitioner's contention that he was denied a fair trial. His chief complaint centers on what appears to have been two additional loans to him—in the amount of $1,500 and $1,000—which came to the attention of the jury. The first was discovered by the jurors themselves, during their deliberations in the course of examining the minute book properly admitted into evidence to rebut petitioner's defense (*supra*, p. 6; A. 80–81). Petitioner asked the court to instruct that this item was irrelevant and immaterial (A. 81); the government joined the request (A. 82) and the court granted it, explicitly informing the jury that the only transactions at issue were the eight specified in the bill of particulars (A. 83–84). Petitioner expressed no dissatisfaction with this handling of the matter. See Pet. App. 29; 434 F. 2d at 961.

The $1,000 loan was brought out on cross-examination to contradict petitioner's testimony that he limited disclosure in the local's report to the one $300.00 loan in reliance on the local's financial report, prepared by its accountants (A. 53–54). That financial report (G.X. 13) showed as a loans receivable

item that on December 31, 1959 he owed the local $1,000.00 (A. 54–55); the government was permitted to question him about the report for impeachment purposes (A. 55).[5] In view of the limited purpose for which the matter was raised, and the court's later instruction that the only transactions at issue were those specified in the bill of particulars, the claim of constitutional error is untenable. See Pet. App. 26; 434 F. 2d at 960.[6]

3. The court did not invade the jury's function on its instruction that "the information that was contained in [the local's] report was of a material nature" (A. 73). Materiality is a question of law, not, as petitioner contends, a mixed question of law and fact. *Sinclair* v. *United States,* 279 U.S. 263, 298. It remained for the jury to decide whether the disbursements constituted loans, and the court made this responsibility clear in its instructions (A. 75).

4. Subsequent to trial, the government discovered that petitioner had been the subject of electronic surveillance on various occasions during 1963 and 1964.

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[5] The financial report was admitted as a government exhibit during recross examination of the former recording secretary of the local, who testified for petitioner. The only objection raised was that the exhibit was not properly identified (A. 45). The witness was then asked, in light of his testimony that the eight checks were not considered to be loans, whether he considered the $1000.00 item to be a loan (A. 46). Upon objection on grounds of relevancy, the question was withdrawn (A. 47).

[6] Petitioner's remaining contentions of this general nature are frivolous. The prosecutor's suggestion in his summation that petitioner had used the union treasury as his personal bank account (A. 72; Pet. 9) was a fair inference from the evidence. There is no merit to petitioner's claim that he was prejudiced by association with the Teamster's Union.

It offered the transcripts of the monitored conversations to the court for inspection *in camera*, stating its own conclusion that there was no connection between the monitored conversations and the evidence of investigative leads in this case; the Department of Labor agent in charge of the investigation was unaware of the surveillance (A. 86–87). The court then made the transcripts available to petitioner and his attorney, subject to a protective order, Fed. R. Crim. P. 16(e), forbidding them to disclose or discuss the contents elsewhere. It subsequently denied motions to lift or amend the order to permit use of the information the transcripts contained in other cases or to broaden the inquiry in this one (A. 91–92, 98–102).

The district court's unchallenged determination that the electronic surveillance logs revealed nothing connected with the investigation or trial of this case (A. 108; Pet. App. 39)—a determination made after counsel had inspected the transcripts under the protective order—precludes petitioner's claim to further relief in this case. The purpose of requiring that a defendant be shown transcripts of electronic surveillance is to enable him to show, by "well-informed advocacy," *Alderman* v. *United States*, 394 U.S. 165, 184, the "special significance" of "information [which] may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances." *Id.* at 182. This purpose was fully served once the transcripts were made available to petitioner and his principal attorney; the burden was upon him to point out the "special significance" which made them "possible

sources of taint." *United States* v. *Battaglia,* 432 F. 2d 1115, 1117 (C.A. 7), certiorari denied, February 22, 1971, No. 1032, this Term; see also *Alderman* v. *United States, supra,* 394 U.S. at 183. Petitioner cannot claim prejudice in this case because the transcripts were withheld from an attorney representing him in another case, or from others similarly remote from these proceedings. This Court has never suggested that a new trial is required where, after full disclosure to the defendant, lack of taint is clear on the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971